

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEUPOLD & STEVENS, INC.,)
)
Plaintiff,) No. 3:16-cv-01570-HZ
)
vs.) January 27, 2020
)
LIGHTFORCE USA, INC. d/b/a) Portland, Oregon
NIGHTFORCE OPTICS and)
NIGHTFORCE USA,)
)
Defendant.)

TELEPHONIC HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARCO A. HERNANDEZ

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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1 P R O C E E D I N G S

2 THE CLERK: Good morning, Counsel.

3 Your Honor, we are here today for a discovery hearing
4 in the matter of Leupold & Stevens, Inc. versus Lightforce
5 USA, Inc., Civil Case No. 16-cv-1570.

6 Beginning with plaintiff's counsel, please state your
7 appearances for the record. Thank you.

8 MR. PARK: Brian Park for Leupold & Stevens.

9 MR. FERRIS: Kassim Ferris for Leupold & Stevens.

10 MR. BRUNETTE: Nathan Brunette for Leupold & Stevens.

11 MR. DAVIS: Scott Davis for defendant.

12 MR. CASIMIR: And David Casimir for Defendant
13 Nightforce.

14 THE COURT: Good morning. This is Judge Hernandez.

15 I received your e-mail strings, including the one
16 that was sent just this morning -- I don't know, maybe a
17 half-hour ago or so.

18 So let's visit for a minute about the issues here.
19 I'm going to first turn to the initial e-mail that I got. I
20 believe it came from Nightforce, and it was talking about
21 adding an 11th deposition for a Mr. Lazzeroni in Tucson.

22 Then I guess related to that are two other
23 depositions that Leupold is concerned with, and that has to do
24 with -- their names escape me right now. Cromwell is one.

25 Excuse me. Johnson and Stockdill are -- those are

1 the other two that I want to talk about, and I guess we can
2 also talk about Mr. Cromwell as well.

3 So let me first turn to Nightforce. It looks like
4 we started with an issue involving Mr. Lazzeroni. And like
5 everything in this case, it seems to have blossomed into other
6 areas.

7 Is there anything else, other than what you told me
8 about Mr. Lazzeroni, that you want to tell me right now?

9 MR. DAVIS: Your Honor, this is Scott Davis for
10 defendants.

11 Just briefly, we'd like to make note that that's
12 potentially the most important evidence to the defendant in
13 this case. And it wasn't for lack of diligence or trying that
14 it wasn't located and found out earlier that Mr. Lazzeroni has
15 key evidence of the key scope that has been at issue in the
16 case between these parties since 2006.

17 THE COURT: Thank you.

18 What about from plaintiff's perspective?

19 MR. BRUNETTE: Your Honor, from plaintiff's
20 perspective, the issues with respect to Mr. Lazzeroni are, in
21 part, tied up with the same issues with respect to
22 Mr. Cromwell, which is to say our primary concern is that
23 since the last case management conference, Nightforce has
24 taken the position that it has free license to take whatever
25 fact discovery it likes and however much of it likes up until

1 the day before trial and has continued to do so, serving new
2 document productions, new subpoenas on third parties, coming
3 forward with new riflescopes, and even recently indicating
4 that there may be yet more -- further expert reports coming.

5 We're very concerned about the parties' ability and
6 our ability, in particular, to prepare for trial while
7 Nightforce is shifting its position in this regard. We
8 initially tried to work with Nightforce to work something out,
9 made a proposal that Nightforce rejected; and now Nightforce
10 has gone even further with additional new sets of supplemental
11 discovery responses, a new third-party declaration and other
12 things.

13 And, Your Honor, turning specifically to the point
14 that Mr. Davis just made, there is a lack of diligence issue.
15 Mr. Cromwell has been known to Nightforce since May of 2018.
16 He was indicated in Nightforce's supplemental initial
17 disclosures as a potential witness at that time. Nightforce,
18 for whatever reason, did not elect to take his deposition or
19 pursue him for discovery at that time. It was allowed to sit
20 for nearly two years, and Nightforce now contends that they
21 got information from Mr. Cromwell that made Mr. Lazzeroni
22 relevant.

23 But this is all discovery that should have been taken
24 during the fact discovery phase of this case. And we have
25 heard no explanation of why it was not, why it could not have

1 been, or why it needs to be done now, at the eleventh hour,
2 when the parties are trying to prepare for trial on the
3 theories already in the case.

4 THE COURT: Thank you.

5 THE COURT REPORTER: Counsel, this is the court
6 reporter. You did not identify yourself.

7 MR. BRUNETTE: I apologize. This is Mr. Brunette.

8 THE COURT: As regards Mr. Lazzeroni, I'm going to
9 order that he be allowed to be subpoenaed and deposed; and
10 I'll leave it to the parties to work out the specific
11 arrangements.

12 Let's now turn to Mr. Cromwell. And, again, I don't
13 know. Is it Mr. Davis that's been responding to these issues
14 or Mr. Casimir? But please identify yourself.

15 So let's talk about Cromwell. And it is a good
16 question. Why is it taking so long to get around to Cromwell?

17 MR. DAVIS: Yes, Your Honor, Scott Davis for
18 defendant.

19 Mr. Cromwell certainly was disclosed in 2018 by
20 Nightforce as potentially having relevant information. He's
21 the former president of Schmidt & Bender, Inc., which is the
22 U.S. operation for Schmidt & Bender. He was interviewed early
23 in the case, and we were led to believe that he did not have
24 any information of relevance anymore.

25 Once he gave up his position and the business of

1 Smith & Bender, Inc., which has since moved to Georgia under
2 new management, he -- he had informed us that he had returned
3 all of his materials to Schmidt & Bender in Germany and he
4 didn't have anything more.

5 And as it is with third parties, there's no control
6 over them. But sometimes with persistence, it can pay off.
7 And we -- maybe it's just a function of asking in a different
8 way or on a different day. But at the end of last year, he
9 was finally able to locate the records -- very few records,
10 but one of which was in the e-mail to the Court, which
11 literally was provided to us on December 31st of 2019 for the
12 first time, indicating that the key scope had been shipped to
13 Mr. Lazzeroni in Tucson, Arizona, in 1997.

14 So, you know, it's a function of old records that
15 were very, very old; and finally the third party was able to
16 locate something for us. And we certainly wish he had found
17 it earlier. There's no reason that we wanted to hold out and
18 not have this evidence until this point in time. This is key
19 evidence that Nightforce would have liked to have had from
20 Day 1 of the '907 patent being in the case.

21 THE COURT: Thank you.

22 Mr. Brunette, do you have anything else on
23 Mr. Cromwell?

24 MR. BRUNETTE: Your Honor, I think it is exactly as
25 I previously mentioned, which is to say that Nightforce, for

1 whatever reason, elected not to pursue formal discovery as to
2 Mr. Cromwell back during the actual fact discovery phase of
3 this case and could have done so.

4 Nightforce has represented to this Court, in its
5 joint submission before the last telephone conference, that it
6 was done taking discovery, apart from following up on an
7 outstanding subpoena to U.S. Customs, and yet now is taking
8 more third-party discovery and continuing to turn over new
9 documents and new theories in the case.

10 And we're not at all sure that this evidence is going
11 to be relevant. It is not nearly as conclusive as Mr. Davis's
12 e-mail to the Court makes it seem, that there is any relevance
13 to any of this. And we have a lot of work to do to prepare
14 for trial imminently.

15 THE COURT: Okay. Thank you.

16 Mr. Cromwell -- I'm going to go ahead and allow
17 Mr. Cromell's deposition.

18 Let's move on and talk about the other two
19 individuals that were noted in, I think, the e-mail from
20 Leupold, and that's Mr. Stockdill and Mr. Johnson.

21 And, as I recall, they were originally hybrid
22 witnesses that were going to be talking about particular areas
23 as regards their expert testimony; and, from Leupold's
24 perspective, those areas have expanded. That's my
25 understanding.

1 And I'll turn first to you, Mr. Brunette. What do
2 you want to tell me about these two fellows?

3 MR. BRUNETTE: Your Honor, I think you've got that
4 exactly right. These are individuals who are both employees
5 of Nightforce, who were deposed in their fact witness capacity
6 previously.

7 We were given, on August 10th of 2018, an initial set
8 of fairly broad and vague disclosures about what their expert
9 testimony was going to be. Your Honor previously ruled on a
10 motion to compel regarding privilege waiver as to these
11 individuals. And shortly after that ruling, we were given, by
12 counsel for Nightforce, a new set of disclosures that much
13 more strictly limited the testimony of these two witnesses.
14 Specifically, with respect to Mr. Johnson, he was limited to
15 only one issue he was going to talk about; and Mr. Stockdill
16 was limited to four relatively narrow topics.

17 Virtually on the eve of their scheduled depositions
18 earlier this month, we received, in an evening production, a
19 surprise set of new supplemental designations designating them
20 on a variety of new topics which, from our perspective, were
21 issues that are not in any way newly discovered by Nightforce
22 but could have been addressed a long time ago and had not
23 been.

24 We believe these disclosures are untimely and that
25 the Court should enforce the scope of Nightforce's

1 December 12th, 2018 disclosure on the substance of these
2 witnesses' testimony.

3 THE COURT: And what are the new areas that they're
4 going to be talking about?

5 MR. BRUNETTE: Your Honor, the December 12, 2018
6 topics, Mr. Johnson was supposed to talk only about the
7 availability and acceptability or superiority of
8 non-infringing alternative designs to the '907 and '305
9 patents, for example. That's the sole topic that he had at
10 that time.

11 Now there are a whole variety of different invalidity
12 assertions as to the '907 patent, without going through the
13 detail of all of them, opining about various prior art
14 theories and non-prior art theories, some of which other
15 Nightforce experts have addressed and some of which appear to
16 be unique to Mr. Johnson.

17 THE COURT: All right. Thank you.

18 And you mentioned Mr. Johnson. Is the same thing
19 true for the other individual as well, Mr. Stockdill?

20 MR. BRUNETTE: Mr. Stockdill -- Your Honor, this is
21 Mr. Brunette again. Mr. Stockdill was also -- in addition to
22 the topic of non-infringing alternatives in the December 12th
23 e-mail, he was also designated to talk about Nightforce's own
24 erectors and assembly process; Nightforce's repair and
25 inspection operations; and, third, Nightforce's side focus

1 parallax adjustment knobs in and before 2000.

2 And now Mr. Stockdill has a similar set of new
3 non-Nightforce prior art invalidity theories that he has been
4 designated to talk about.

5 THE COURT: Thank you.

6 Mr. Davis, what do you want to tell me?

7 MR. DAVIS: Thank you, Your Honor.

8 As to both of those witnesses, Mr. Stockdill and
9 Mr. Johnson, the recent disclosure and supplement of their
10 proposed opinion testimony is commensurate in scope with what
11 they were originally designated on in August of 2018.

12 And what we did is we provided a high level of detail
13 in the recent disclosure; and I think it's the additional
14 detail that is, in part, giving Leupold concerns, making it
15 look like it's more testimony or subjects than they had
16 originally been designated to handle, but it really is not.
17 It's actually narrowed and focused on the '907 patent. There
18 were also disclosures as to the '305 patent, which is out of
19 the case at this point; and, obviously, we don't expect
20 they'll be deposed about that.

21 But to the extent there's new information in the
22 recent disclosure, our view is that it was in direct response
23 to the Court allowing the Weatherby and Zeiss evidence into
24 the case for the '907 patent at the November 21st, 2019
25 conference. And they are also directly responding -- their

1 opinions are directly responsive to Mr. Byron's opinions
2 relating to Weatherby and Zeiss, some of which were disclosed
3 in his most -- well, not his most recent, but one of his most
4 recent reports, on October 17 of 2019.

5 And when Leupold complained about the recent
6 disclosures being too close to the original deposition dates
7 for Mr. Johnson and Mr. Stockdill, we readily accommodated
8 changing their deposition dates to the now-agreed dates next
9 week --

10 THE COURT: Thank you.

11 MR. DAVIS: -- so they would have ample opportunity
12 to prepare.

13 THE COURT: Thank you.

14 As you may have gathered, I am loath to exclude
15 evidence unless I have to. And to the extent that I need to
16 accommodate Leupold in order to allow additional
17 discovery -- which looks to me like there is some dispute
18 about the scope and whether it is crossing other lines that I
19 have previously drawn or not. It's not clear to me that it
20 does. But because I'm loath to exclude evidence as a remedy,
21 I'm going to allow Johnson and Stockdill as well to be
22 deposed; and we will adjust the schedule, as needed, in order
23 to accommodate Leupold's sense that they need more time in
24 order to adjust to the depositions that are going to take
25 place.

1 I think those are all of the things that were sent to
2 me originally. I'm not talking about what was sent to me this
3 morning.

4 From the defendant's perspective, am I correct about
5 that?

6 MR. DAVIS: Yes, Your Honor, excluding what came in
7 this morning.

8 THE COURT: Okay. Thank you.

9 And from plaintiff's perspective, have I wrapped up
10 everything except for what came in this morning?

11 MR. BRUNETTE: Your Honor, from our perspective, I
12 think we have two outstanding questions, one of which is
13 where do we stand on the *Daubert* briefing schedule, which we
14 think will need to be adjusted, as indicated in our e-mail. I
15 think the Court may have implicitly indicated that that would
16 be acceptable, but I wanted to ask about that.

17 And, in addition, what is the Court's position on
18 fact discovery going forward, other than the specific items
19 that were just listed? And should the parties assume that
20 fact discovery on all other issues is currently closed?

21 THE COURT: Let's take them one at a time.

22 I'm willing to adopt the dates that you gave me from
23 Leupold's perspective. Is there anything else I need to do
24 regarding adjusting deadlines?

25 MR. BRUNETTE: Not at this time, Your Honor, although

1 the parties are still working on one expert deposition that
2 may be rescheduled. And depending on where that goes, the
3 parties may have a further request about the *Daubert* briefing
4 schedule.

5 THE COURT: Okay. And then, secondly --

6 MR. DAVIS: Your Honor --

7 THE COURT: Yes, sir.

8 MR. DAVIS: Your Honor, this is Scott Davis for
9 defendant.

10 On the schedule, now that we've sort of moved on to
11 the issues raised this morning, I think there are new issues
12 since the e-mails went in last week that could affect the
13 schedule. We certainly don't object to the extension of the
14 expert motion briefing, an extension of it, but as proposed by
15 Leupold, I don't think that's going to be enough time.

16 We just found out this morning that it's unlikely
17 Leupold will be able to present this expert witness,
18 Mr. Byron, for his deposition before mid February. And, in
19 fact, it sounds like he's planning to prepare another report
20 responding to whatever Mr. Johnson and Mr. Stockdill say in
21 their depositions. So as a practical matter, I don't think
22 we'll even have the deposition of Mr. Byron done until the end
23 of February; and we would need a reasonable time after that to
24 prepare expert motions.

25 So big picture, it seems like the schedule, in

1 Nightforce's view, is somewhat in jeopardy for pretrial
2 preparation and even the trial date at this point in time, to
3 be able to get everything done in an orderly way.

4 Also, as noted in the e-mail this morning, we
5 received a new witness disclosure that Leupold apparently may
6 or will call CEO Bruce Pettet as a witness at the trial. We
7 didn't find that out until last week. He had not been
8 previously disclosed.

9 Nightforce is still evaluating, but may seek to take
10 his deposition before trial and would like to have the
11 opportunity to do that, if it decides that's in its best
12 interest.

13 And as to additional legal theories in the case,
14 Leupold last week, after the e-mails went into the Court,
15 updated some of its interrogatory responses and, for the first
16 time, distinguished certain claims in the '907 patent
17 purportedly from the Schmidt & Bender prior art that's been
18 front and center in the case, which they had, as the Court
19 knows from the summary judgment briefing, not previously
20 disputed on the merits, but if proved to be prior art, then
21 the claims all would be invalid. And now we're trying to save
22 a couple of claims by distinguishing them, even if Schmidt &
23 Bender is proved to be prior art, which we think, in view of
24 the new evidence, Nightforce will be able to establish.

25 And as well on Friday, Leupold updated in their

1 interrogatory response to assert doctrine of equivalents
2 infringement as to all patents, not just the '907 patent, but
3 including the '907 patent. And that typically involves a host
4 of additional issues in a case where a party in Leupold's
5 position would need to offer expert opinion to support that
6 new infringement theory. It's not simply a fallback position,
7 under Federal Circuit law, to a failed literal infringement
8 case.

9 And as identified in our interrogatory response last
10 week, it appears that the reason for asserting doctrine of
11 equivalents infringement, at least as to the '907 patent, is
12 tied directly to the claim construction issues pending before
13 the Court. And until those are resolved, it's unclear if
14 Leupold will be pursuing doctrine of equivalents or providing
15 additional expert opinion about that.

16 THE COURT: Well, that tells me that you need to talk
17 to each other about what a schedule might look like.

18 But let me -- before I move off of that or before I
19 get to that topic, I want to talk about what came in this
20 morning. I understand Leupold wants to -- or it updated
21 initial disclosures regarding Mr. Pettet, and Nightforce is
22 thinking they may want to do additional discovery with
23 Mr. Pettet as a result of the updated disclosures.

24 And then, also, in response to interrogatories,
25 Leupold, according to the e-mail that was sent to me, raised

1 some issues regarding the Schmidt & Bender prior art and has
2 asserted the theory of the doctrine of equivalents on all
3 patents as an alternative to literal infringement; and I'm
4 assuming that includes the '907. I don't know what the
5 question is before the Court that either side wants me to
6 address as regards that.

7 So other than the defense telling me they think
8 they're going to need more time, Mr. Davis, from your
9 perspective, is there anything else you want me to do about
10 those issues?

11 MR. DAVIS: Your Honor, I think that we would ask
12 that the expert motion deadline be moved out further than
13 requested by plaintiff, and that it looks like that's going to
14 run up against the current March 16th deadline for the first
15 wave of pretrial filings, such that expert motions may not
16 even be ready to be filed by then.

17 All of this really is putting the trial date in
18 jeopardy, in Nightforce's view, for this case to really be
19 prepared for trial. And if doctrine of equivalents is an
20 issue, and we don't really know that until after the Court
21 rules on claim construction, expert reports would need to
22 follow from that, and it could take months more time than we
23 have, Your Honor.

24 THE COURT: Thank you.

25 Mr. Brunette, what do you want to tell me?

1 MR. BRUNETTE: Your Honor, from plaintiff's
2 perspective, there are a number of new issues that Mr. Davis
3 spoke to that I would like to be heard on.

4 First of all --

5 THE COURT: Well, can I interrupt you? Mr. Brunette,
6 can I interrupt you for just a second?

7 My inclination is to direct the parties to confer
8 about a new schedule and then just let the Court know what you
9 come up with.

10 Is that acceptable to you or do you want me to
11 resolve something right now on scheduling? Because given what
12 I've been told, I can pick dates, but they would certainly be
13 arbitrary and not informed.

14 MR. BRUNETTE: Your Honor, we are just fine with
15 conferring with opposing counsel and coming up with a
16 schedule.

17 From Leupold's perspective, we are very committed to
18 keeping the existing trial date and would want to make sure
19 that the parties are both shooting towards a schedule that
20 preserves the existing trial date.

21 THE COURT: Okay. Well, why don't you confer amongst
22 yourselves.

23 And then I didn't -- I did cut you off, and I meant
24 to, but I also didn't want to rob you of the opportunity to
25 tell me if there was something else you needed me to resolve

1 this morning.

2 MR. BRUNETTE: No, Your Honor. We disagree with a
3 number of the assertions that were made, but given the Court's
4 ruling, that's not something that needs to be addressed right
5 now.

6 The only other issue we have, Your Honor, is that
7 at -- I believe it's at the last scheduling conference, the
8 Court indicated that it would be entering an order about the
9 four pretrial waves; and that, I believe, has not yet been
10 entered as to what the substance of those waves are -- I think
11 both parties have seen it before -- and then our outstanding
12 question of whether fact discovery is closed.

13 THE COURT: Okay. So I want you to confer about all
14 of those issues because, again, I don't know what else might
15 be floating around out there. This is a moving target in a
16 lot of ways. And I've seen this in patent cases before.
17 People find new inventions at the last minute or they find
18 other art that they think is prior art, and it just changes
19 the landscape.

20 And that's exactly what has happened in this case.
21 The defense found evidence that brings some date issues
22 regarding Smith & Bender to the forefront; and, not
23 surprisingly, Leupold, who didn't think they had to worry
24 about that is now worried about it and adjusting as a result
25 of that.

1 I'm okay with all of that. I get it. It takes
2 longer for the case to develop as these kinds of things come
3 up.

4 So I'm okay with moving dates around to the extent
5 that they need to be moved around. I would like to preserve
6 the trial date just because I would like to get this case off
7 my plate and move on to the next series of patents that we
8 still need to talk about.

9 So I want the parties to confer, then get back to the
10 Court about what it is you think we need to do next and when.
11 And to the extent that there is disagreement, then I'll
12 resolve your issues.

13 Is that acceptable to plaintiff? Mr. Brunette, does
14 that sound okay to you?

15 MR. BRUNETTE: Yes, Your Honor.

16 THE COURT: Mr. Davis?

17 MR. DAVIS: Yes, Your Honor.

18 THE COURT: And so, Mr. Brunette, how much time do
19 you think you're going to need to work with the other side and
20 come up with either a schedule that you both agree upon or let
21 me know where the disagreements are?

22 MR. BRUNETTE: Your Honor, from plaintiff's
23 perspective, we would be ready to find a time this afternoon
24 to confer with counsel for the defendant and move this process
25 along.

1 THE COURT: Mr. Davis, does that sound okay to you?

2 MR. DAVIS: Yes, Your Honor.

3 THE COURT: Hang on just a second.

4 (Pause) And then as regards the fact discovery, from
5 Nightforce's perspective, is there any other fact discovery
6 that you're planning on engaging in?

7 MR. DAVIS: Not other than has been mentioned and
8 described on this call, barring any unforeseen circumstance
9 where good cause could lead to follow-up on something after a
10 deposition that takes place.

11 THE COURT: So at this point, then, can I say that
12 fact discovery is closed, from defendant's perspective?

13 MR. DAVIS: Yes, Your Honor, subject to allowing the
14 discovery the Court has ordered here and potentially also of
15 Mr. Pettet, the CEO of Leupold.

16 THE COURT: Mr. Brunette, does that make sense to
17 you?

18 MR. BRUNETTE: Yes, Your Honor, subject to routine
19 supplementation. I know both parties, for example, have sales
20 numbers they would like to supplement.

21 THE COURT: Okay. So I'm going to order that fact
22 discovery is closed, I think -- that's a technical, legal
23 thing -- because, again, you may run into other pieces of
24 evidence that change that. But let's operate under the
25 assumption that fact discovery is closed, other than as I've

1 talked about today. And then if something comes up, confer
2 amongst yourselves and see if you can resolve it.

3 Mr. Brunette, do you have anything else for me that
4 I need to talk about?

5 MR. BRUNETTE: No, Your Honor, thank you.

6 THE COURT: Mr. Davis, how about from defense
7 perspective?

8 MR. DAVIS: No, Your Honor.

9 THE COURT: All right. Thank you both. Thank you
10 all.

11 MR. DAVIS: Thank you.

12

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14 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker

1-28-20

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

DATE

	9	assumption [1] - 21:25 August [2] - 9:7, 11:11 availability [1] - 10:7 Avenue [2] - 2:6, 2:16
'305 [2] - 10:8, 11:18 '907 [10] - 7:20, 10:8, 10:12, 11:17, 11:24, 15:16, 16:2, 16:3, 16:11, 17:4	90-0091 [1] - 23:13 97204 [2] - 2:14, 2:16 97205 [1] - 2:7 98101 [1] - 2:4	B
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